No. 20671

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT E. McCARTHY, Successor to WALTER E. BECK, as Manager of the United States Land Office at Sacramento, California,

Appellant

v.

LEONARD E. NOREN AND HARRY C. PERRY,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE APPELLANT

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Cases:

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OPINION BELOW

The district court's unreported memorandum opinion and order are set out at pages 152-154 of the record.

JURISDICTION

Jurisdiction was invoked by the appellees against appellant purportedly under the Fifth Amendment of the Constitution of the United States and the Act of March 3, 1877, 19 Stat. 377, as amended, 43 U.S.C. sec. 321, and the Act of June 28, 1934, 48 Stat. 1272, as amended, 43 U.S.C. sec. 315f (the Taylor Grazing Act). Although not specifically invoked, apparently the district court took jurisdiction under the Act of October 5, 1962, 76 Stat. 744, 28 U.S.C. secs. 1361, 1391(e). Judgment of the district court for appellees was entered on September 17, 1965 (R. 155). Notice of appeal was filed on November 15, 1965 (R. 162). This Court's jurisdiction rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the district court erred in holding that due process requires that the Department of the Interior must hold an adversary type hearing when public lands are being classified in response to an application filed under the Desert Land Act (43 U.S.C. sec. 321 et seq.).

2. Whether the district court erred in holding the Secretary of the Interior's rejection of the appellees' application to enter land under the Desert Land Act was capricious and arbitrary.

3. Whether the district court erred in not granting appellant's motions to dismiss on the ground of res judicata.

STATUTES INVOLVED

43 U.S.C. sec. 315f provides:

> The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, or proper for acquisition in satisfaction of any outstanding lien, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same

have been classified and opened to entry: Provided, That locations and entries under the mining laws including sections 181-184, 185-188, 189-194, 201, 202-209, 211-214, 223, 224-226, 226-2, 227-229a, 241, 251, and 261-263 of Title 30, may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this chapter. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: Provided, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided. (June 28, 1934, ch. 865, § 7, 48 Stat. 1272; June 26, 1936, ch. 842, title I, § 2, 49 Stat. 1976.)

43 U.S.C. sec. 322 provides:

> All lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of sections 321-323, 325 and 327-329 of this title, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.
>
> The determination of what may be considered desert land shall be subject to the decision and regulation of the Secretary of the Interior or such officer as he may designate. (Mar. 3, 1877, ch. 107, §§ 2, 3, 19 Stat. 377; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F. R. 7876, 60 Stat. 1100.)

STATEMENT

This action was instituted by the appellees, Noren and Perry, seeking to enjoin the Manager of the Sacramento Land Office and the State Supervisor of the Bureau of Land Management, California, from taking any further adverse administrative action with respect to their application to enter certain desert lands. Appellees also sought to compel the appellant to reinstate their desert land applications, to allow the same and to permit them to enter the lands embraced within their respective applications (R. 6).

The sequence of events leading to this action is as follows: The appellees herein filed desert land entry applications in the Sacramento Land Office on November 26, 1951, and January 3, 1952 (R. 173). The Manager of the Sacramento Land Office, by decision dated January 9, 1953, rejected both applications on the ground that a field report on the tracts of land sought to be entered showed that the soil was unsuitable for agricultural development due to an extremely high accumulation of salt. The appellees herein appealed this rejection of their applications to the Director of the Bureau of Land Management, alleging that the decision was arbitrary, capricious and a fraud on the Desert Land Act and that the Manager had relied on a record which they were not permitted to see, so that their rights were denied without a hearing on the facts. The Director of the Bureau of Land Management affirmed the decision of the Land Office Manager on November 24, 1954, pointing out that the determination of what is desert land is subject to the decision and regulation of the Secretary of the Interior or his designee, citing 43 U.S.C. sec. 322. The Director also pointed

out that the land in the entries was withdrawn from settlement, location, sale or entry and that the Secretary of the Interior is authorized by Section 7 of the Taylor Grazing Act, as amended (43 U.S.C., 1952 ed., sec. 315f), in his discretion, to examine and classify such withdrawn land and, when he finds that the land is more valuable or suitable for other purposes than for the production of forage, to restore such land to entry.

The appellees appealed from the adverse decision to the Secretary of the Interior. By decision dated August 1, 1955 (R. 168, 169), the Secretary noted that two desert land entries had been allowed within one to three miles of the subject tracts. The Secretary, as a result of the allowance of the nearby entries, remanded both cases to the Land Office, with instructions to allow the appellees a reasonable time to submit whatever evidence they desired to disprove the classification of the lands applied for as being unsuitable for agricultural development. As a result of this remand, the appellees and the Bureau of Land Management individually

conducted additional studies with respect to the controverted lands. The records of both examinations were then resubmitted to the Director's office, which then issued a decision dated September 25, 1957. This decision again affirmed the rejection of the desert land applications, after having given consideration to the applicants' evidence and an extensive discussion of the problems raised by salt concentrations on the land.

The appellees took an appeal from the Director's decision to the Secretary, protesting that they had not been shown the report of the Bureau's re-examination of the land before the decision was written, disputing the conclusions and decrying the inconclusive role assigned to the photographs submitted by them. The Secretary, by decision dated September 13, 1960 (R. 172), considered in detail what were termed by the appellees to be five erroneous assumptions (R. 175-183) and concluded that they, in fact, were not erroneous (R. 183). The Secretary in his decision concluded that the appellees herein had "not submitted any evidence which proves that the admitted saline character of the soil can be altered so that the land will become suitable for agricultural production by

economical and feasible methods. In the absence of convincing evidence, which the appellants have not furnished, I am unable to suppose that land of very high salinity and low permeability which will prevent economically feasible crop production is improperly classified as unsuitable for desert land entry" (R. 183-184).

The appellees thereafter instituted an action against the local officials of the Bureau of Land Management in the United States District Court for the Southern District of California, Civil No. 2139 N.D. The adverse classification of the subject lands by the Secretary was contended to be arbitrary and unlawful. A trial de novo on the facts was asked for and denied. Noren v. Beck, 199 F.Supp. 708 (Nov. 21, 1961). Judge Crocker in his opinion held that any review of this matter was to be restricted to a review of the administrative record. The court also stated at page 710 of its published opinion that "The plaintiffs' argument that the agency did not hold a formal hearing where witnesses could testify and be cross-examined is answered by the Desert Land Entries Act, 43 U.S.C.A. § 321 et seq., which does not

require such a hearing * * *." The appellees herein took no appeal from this decision. Upon review of the administrative record, Judge Crocker entered a final judgment dated March 8, 1963, which stated "after a careful review I find that the administrative decision and the findings upon which it is based are abundantly supported by the evidence appearing in the record." Accordingly, the district court affirmed the Secretary's decision of September 13, 1960.[1/]

Pending the first case, appellees filed a second complaint. In response to this complaint which the appellees filed (R. 2), a motion to dismiss was made, based on the ground that it was the same cause of action as was already before the district court (R. 14). The district judge, by order filed April 8, 1963 (R. 29), denied the motion, ruling that the "complaint states a different claim than that litigated in Case No. 2139-ND." A second motion to dismiss (R. 32) was filed after the time for appeal from the first cause of action had expired. The reasons given in support of the

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1/ The complaint, opinion and final judgment in this case are printed in the Appendix.

second motion to dismiss were that the complaint failed to state a claim against the defendant upon which relief can be granted, since the matter is res adjudicata; that the court lacks jurisdiction, since the action is in effect against the United States, which has not consented to be sued; and that the plaintiffs have failed to join an indispensable party.

The district judge, by order filed August 12, 1964 (R. 94), denied the Government's motion to dismiss, stating that "The complaint herein states a cause of action based upon a claim of denial of due process guaranteed by the fifth [sic] Amendment of the United States Constitution" (R. 94) and that "This cause of action was not litigated in the previous case of Noren v. Beck, 199 F.Supp. 708, as it had been in Adams v. Witmer, 271 F.2d 29, so the doctrine of res judicata does not apply. The other grounds stated in the motion to dismiss are without merit" (R. 94-95).

The district court, by letter dated November 10, 1964, advised the litigants that the sole issue to be decided by the court was whether the administrative proceedings were conducted in such a way as to deprive the appellees of due process of law.

A memorandum and order were entered by the district court on July 1, 1965 (R. 152), holding that the agency action rejecting the desert land applications was "capricious and arbitrary" and constituted a denial of due process of law. The district court then remanded this matter to the administrative agency for further hearings consistent with its opinion (R. 154, 156). This appeal followed.

Appellees moved to dismiss the appeal on the ground that the judgment was not final and appealable. This was denied by order of this Court of February 9, 1966.

SUMMARY OF ARGUMENT

The decision of the district court reverses 29 years of administrative construction of a section of the Taylor Grazing Act and has the effect of imposing a burden of staggering proportions on the Department of the Interior. The requirement that an adversary hearing be held by the Department of the Interior prior to a discretionary action being taken is clearly contrary to the intent of Congress.

A. The Secretary of the Interior has been given the discretion to classify for disposal or retention the public lands of the United States. The statute and legislative

history clearly show that Congress has vested the Secretary of the Interior with the discretion to classify public lands.

There are no rights to property involved in a classification proceeding. The only right present in this case was to have land classified, which was done. It was never intended by Congress that a judicial review would be made of a classification matter.

B. The exclusive jurisdiction to classify public land has been vested in the Secretary of the Interior. The classification made here is not in any sense arbitrary or capricious. The authority of the Secretary of the Interior is that of a special tribunal for the supervision and disposal of public lands. The judicial power of the United States does not extend to the disposal of public lands. This Court lacks the power to review the Secretary's exercise of discretion.

C. The Department of the Interior's interpretation and consistent application of a statute are entitled to great deference.

D. No rights to land are obtained by the filing of an application to enter public lands.

II

The lack of an adversary type hearing has not prejudiced the appellees, in that they have been permitted to introduce all their evidence and to have it fully considered. The procedure followed in this case is not unique and has clearly been recognized by Congress as a means of properly disposing of public lands.

III

This matter is clearly res judicata, since both complaints are identical in the relief asked for. The only new element introduced in the second complaint was a legal argument based on an alleged violation of due process.

ARGUMENT

Introduction: The decision of the district court, if permitted to stand, reverses 29 years of administrative construction of one of the most important sections of the Taylor Grazing Act, 43 U.S.C. sec. 315f. The district court's decision would have the effect of requiring a major change in the procedure consistently followed by the Department of the Interior in the classification for retention or disposal of public lands belonging to the United States. The magnitude

of the problem can be seen by an examination of the tables in the Annual Report of the Secretary of the Interior, 1958 edition, p. 252, where a breakdown of classification and investigation operations before the Bureau of Land Management during the fiscal year 1958 is given. That report shows that, at the beginning of that year, 24,670 cases were pending classification and investigation. During the year, 17,101 new cases were received and 20,368 cases were closed, leaving pending, at the end of the year, 21,403. The district court's decision, if permitted to stand, would require that an administrative hearing be held in each classification action taken pursuant to 43 U.S.C. sec. 315f. Aside from the fact that this would impose a burden of staggering proportions on the Department of the Interior, this requirement clearly is contrary to the intent of Congress and the clear statutory language contained in the Taylor Grazing Act. Because of the importance of this question to the administrators of the public lands, we address ourselves primarily to it, even though we think in fact there has been no substantial violation of due process principles.

I

ADVERSARY HEARINGS ARE NOT REQUIRED FOR THE CLASSIFICATION OF LANDS UNDER THE TAYLOR GRAZING ACT

A. Congress has given the Secretary of the Interior the discretion to classify for disposal or retention the public lands of the United States. - "The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved * * *, or within a grazing district which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, * * *, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, * * *. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: * * *. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands:

Provided, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided." 43 U.S.C. sec. 315f. (Emphasis supplied.)

This section of the Taylor Grazing Act clearly authorizes the Secretary, in his discretion, to classify for disposal or retention the public lands of the United States. Carl v. Udall, 309 F.2d 653, 657 (C.A. D.C. 1962). It should be noted that, when the Secretary of the Interior was originally given the discretion to classify the public lands of the United States, no provision was made to compel him to take any classification action. And, of course, there are no private rights of any kind in the land, at least until after favorable classification.

The original delegation by Congress of discretion to the Secretary of the Interior was reaffirmed by the amendment to the Taylor Grazing Act dated June 26, 1936, c. 842,

Title I, sec. 2, 49 Stat. 1976, which added the requirement that the Secretary (1) in response to a qualified application shall "cause any tract to be classified," and (2) provided that "such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, * * * if opened to entry as herein provided." The Act laid down no requirements as to the procedure to be followed by the Secretary in making classifications.

The question whether too much discretion was being given the Secretary of the Interior in the Taylor Grazing Act was clearly of concern to the drafters of that Act. In hearings, prior to passage of that Act, before the House Committee on Public Lands, 73d Cong., 1st sess., on H.R. 2835, and 73d Cong., 2d sess., on H.R. 6462, February 23, 1934, at pages 138-139 of the hearings, this concern is concisely stated and recognized:

> Mr. ENGLEBRIGHT. May I make another suggestion, since the Secretary is here: One objection most frequently heard in the meetings of this committee on this bill is that the bill would give too wide a discretionary jurisdiction over the public domain to the Secretary of the Interior.

That objection was made in general here, and I think it is the feeling on the part of a considerable number of the members of the committee. I believe it would be valuable if the committee heard the Secretary's views on that point.

Secretary ICKES. Somebody, in my judgment, has to have this authority. If the Secretary of the Interior's record and his views on public questions is such that he cannot be intrusted with the authority, give it to somebody else, but if you will pardon a self-serving statement, I am prepared to say that so far as power lies in me, I would try to administer the law, if intrusted with this power, to the best interests of all concerned.

Mr. ENGLEBRIGHT. I am sure, Mr. Secretary, we would not offer the objection on that ground. It is not the intention of any member of the committee to object to this discretion being lodged in yourself. The objection was to the lodging of this discretionary jurisdiction over the public domain in any bureau. That was the objection.

Secretary ICKES. As it is now, your range is being destroyed. Somebody has to be entrusted to administer it for the best good of all concerned. I think it is absolutely necessary to do it in the public interest.

The CHAIRMAN. I think without that clause in there the bill would be meaningless.

Secretary ICKES. It would not mean a thing.

In Hearings before the Committee on Public Lands and Surveys, United States Senate, 74th Cong., 1st sess., on S. 2539, a bill to amend the "Taylor Grazing Act," which resulted in the passage of 49 Stat. 1976, the recognition of the discretionary authority which had been given the Secretary by Congress in enacting the Taylor Grazing Act is also discussed. It is stated at page 8 of the Hearings held on May 15, 1935, that:

> Senator O'MAHONEY. Under the law as it now stands and under the amendment as it has been presented here, the Secretary is authorized in his discretion to examine and classify.
>
> Mr. PAGE. That is true.
>
> Senator O'MAHONEY. Would you think that it would be advisable to make it mandatory upon the part of the Secretary to make this reclassification?
>
> Mr. PAGE. No; I do not think so. The history of public-land legislation of the last several years has been to include that term in nearly all acts. And I do not think it is advisable to depart from it. In other words, the Secretary uses his discretion properly, and I think the Secretary should be given the discretion. In other words, you will make an application under this provision and it will have to be examined. If the proper

showing is made, just the same as for a great many entries under other laws of recent years, and if everything is found to be proper, the Secretary will use his discretion properly to allow that entry.

Senator O'MAHONEY. That is not what I have in mind. Of course the discretion of the Secretary to allow an entry or to reject it ought to be preserved. That is the whole history of the development of the public-land law, that the Secretary passes upon all applications. The thought in my mind is whether it would be advisable to make the classification mandatory.

Senator HAYDEN. I can say, Senator O'Mahoney, that classification was quite thoroughly discussed at the time of the enactment of the 640-acre homestead law. You will remember that at that time Congressman Kent, of California, was very active in that respect. I was a member of the Public Lands Committee of the House of Representatives at the time, and there was quite strong sentiment to direct a classification of all public lands. Two objections were raised: First, that if Congress made it mandatory that it be done, then funds would have to be provided to do the work, and no one knew when we would get the appropriations from the Treasury to make the classification, and, second, that pending the completion of a mandatory classification everything would be tied up. So, the committee finally concluded that the best way to proceed was that as the occasion arose a classification might be made.

The court here has directed that an adversary type of hearing be held by the Department of the Interior. This is a complete departure from the history of public administration since the founding of the country. There are a myriad of matters in which the Secretary has been vested with discretion to determine. Historically, almost none of these have been the subject of adversary type hearings with presentation of witnesses pro and con with respect to a contemplated action, subject to cross-examination, etc. This simply was never intended by Congress as to the Taylor Grazing Act in this particular or any other public land statute which is silent on t subject. No rights are involved in this type of classification proceeding. Congress was simply disposing of its bounty when it established the manner in which the public lands are to be obtained by citizens of this country. No rights exist to have lands favorably classified. Another evidence of the fact that Congress never envisaged an adversary type proceeding is the provision in the statute that the Secretary may examine and classify any lands withdrawn without any application for the lands having been filed.[2/] The fact that Congress provided

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2/ The pertinent regulations are contained in 43 C.F.R. sec. 296.1(a)(1).

for ex parte classification of lands by the Secretary reinforces the position that this is simply a matter of discretion in the course of the largest real estate management program in the country. The fact that the classification was in response to an application does not in any way change the standard applied. In fact, since the Secretary may classify lands on an ex parte basis, it is obvious that Congress never intended for a judicial review to be made of his classification. The only relief from an unfavorable classification would be from the Congress which gave the discretion to the Secretary.

B. The Secretary has exclusive jurisdiction to classify the public lands of the United States. - Article IV, Section 3, of the Constitution vests in Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." "That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, * * *." Gibson v. Chouteau, 13 Wall. 92, 99

(1871). In Section 7 of the Taylor Grazing Act, June 28, 1934, 48 Stat. 1269, 1272, as amended by Section 2 of the Act of June 26, 1936, 49 Stat. 1976, 43 U.S.C. sec. 315f, Congress authorized the Secretary of the Interior, "in his discretion, to examine and classify any lands withdrawn or reserved" by Executive Order No. 6910, which embraces the land involved here, and it further specified: "Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." When appellees filed their Desert Land applications in these cases, the Secretary, by his delegated representatives, examined the lands and classified them, but he classified them as unsuitable for agricultural development and rejected the Desert Land applications to enter the subject lands. Thus, because of the failure to obtain a favorable classification, one of the conditions prescribed by Congress for the transfer of these particular lands from the public domain, appellees were not entitled to them.

Appellees sought to reverse the discretionary determination of the Secretary by obtaining a hearing or trial de novo. By claiming that they are entitled to a hearing and

that the Secretary has arbitrarily classified the land, they have sought and obtained a review to which they are not entitled. The classifications made by the Secretary here are clearly within the scope of the authority vested in him by the Taylor Grazing Act and were not in any sense arbitrary or capricious.

The grant of discretion to the Secretary to classify lands withdrawn by Executive Order No. 6910 is so clearly expressed in Section 7 of the Taylor Grazing Act, 43 U.S.C. sec. 315f, that it is difficult to see how any question about its existence can arise. The Secretary of the Interior has been "charged with the supervision of public business relating to * * * The public lands, * * *." R.S. sec. 441; 5 U.S.C. sec. 485. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is directed to "perform all executive duties * * * in anywise respecting * * * public lands * * *." R.S. sec. 453; 43 U.S.C. sec. 2. He is expressly "authorized to enforce and carry into execution, by appropriate regulations,

every part of the provisions of * * * [the Title dealing with public lands] not otherwise provided for." R.S. sec. 2478; 43 U.S.C. sec. 1201.

The Supreme Court, in Cameron v. United States, 252 U.S. 450 (1920), at pages 459-460, stated the proposition that:

> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Rev. Stats., §§ 441, 453, 2478; United States v. Schurz, 102 U.S. 378, 395; Lee v. Johnson, 116 U.S. 48, 52; Knight v. United States Land Association, 142 U.S. 161, 177, 181; Riverside Oil Co. v. Hitchcock, 190 U.S. 316.

See also Best v. Humboldt Mining Co., 371 U.S. 334, 337 (1963).

The authority given the Secretary of the Interior to supervise the administration and disposal of the public lands of the United States creates a special tribunal for this purpose, and may not be interfered with through mandamus or

injunction processes. United States ex rel, Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1903); United States ex rel. McBride v. Schurz, 102 U.S. 378 (1880); Brown v. Hitchcock, 173 U.S. 473 (1899); United States ex rel, Hall v. Payne, 254 U.S. 343 (1920).

In this case, the district court found the lack of a "fair hearing" by the Department of the Interior constituted an arbitrary and capricious act, requiring remand to that agency for the holding of a hearing (R. 154, 155). It is implicit in a discretionary matter that no hearing is required to be held. Jay v. Boyd, 351 U.S. 345 (1956); Shaughnessy v. Mezei, 345 U.S. 206 (1953); United States v. Nugent, 346 U.S. 1 (1953); Knauff v. Shaughnessy, 338 U.S. 537 (1950). The court's characterization of the administrative action as "arbitrary and capricious" adds nothing. It is merely another way of stating the court's conclusion that there must be an adversary hearing comparable to a legal trial. There is nothing to justify an attack on the administrative proceedings here, absent such an absolute requirement. Indeed, as noted later, there is nothing to indicate substantial prejudice to appellees because of lack of such a hearing.

The district court should have granted appellant's motion to dismiss, on the basis that this is a matter within the jurisdiction of the "special tribunal" concerning which the courts have only a limited function of review. "[S]o long as the legal title remains in the Government all questions of right should be solved by appeal to the land department and not to the courts." Brown v. Hitchcock, 173 U.S. 473, 477 (1899); Best v. Humboldt Mining Co., 371 U.S. 334, 338 (1963); Boesche v. Udall, 373 U.S. 472 (1963). This Court has long recognized the limited function of the courts in matters involving public lands. In Standard Oil Co. of California v. United States, 107 F.2d 402, 409-410 (1940), cert. den., 309 U.S. 654, this Court stated:

> The disposal of the public lands is not a subject over which the "judicial power" of the United States is extended. It is a field in which the authority of the Congress is supreme. Lee v. Johnson, 116 U.S. 48, 6 S.Ct. 249, 29 L.Ed. 570; Art. IV, sec. 3, clause 2, of the Constitution, U.S.C.A.

The Supreme Court, in United States ex rel. Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549 (1919), an analogous case, stated the rule (p. 555): "But where there is discretion,

* * *, even though its conclusion be disputable, it is impregnable to mandamus. [Citations omitted.]"

This Court, in Ferry v. Udall, 336 F.2d 706 (1964), in considering a question similar to that raised by this appeal, found that it lacked the power to review the Secretary's exercise of discretion. This Court held (pp. 711-712):

> * * * The Isolated Tracts Act commits the decision to sell to the Secretary's discretion. Under the regulations adopted to administer the Act, the Secretary reserved the right to exercise that discretion any time before a bid had been accepted by the issuance of the cash certificate. Since section 10 of the Administrative Procedure Act prohibits judicial review of agency action "* * * by law committed to agency discretion * * *," we are without power to review the Secretary's decision in this case.
>
> We recognize the intrinsic difficulty in determining whether a discretionary action of an agency is reviewable. Almost every agency action involves some degree of discretion of judgment. Yet it cannot be said that, for this reason, every agency action is unreviewable. Homovich v. Chapman, 89 U.S.App.D.C. 150, 153, 191 F.2d 761, 764. The analytical problem is that of determining when the agency action is "committed to agency discretion" within the meaning of section 10 of the Administrative Procedure Act, and when it merely "involves" discretion which is nevertheless reviewable. 4 Davis, Administrative Law Treatise § 28.16, pp. 80-81; Anno., Administrative Procedure Act, 97 L.Ed. 884, 889.

> Our decision that the Secretary's decision is "committed" to his discretion is consistent with Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788. There it was held that the courts could not review toll rates set by the Panama Canal Company because toll adjustments were a matter left to the discretion of the Company. It was determined that this decisional process was committed to the Company's discretion because it involved "* * * matters on which experts may disagree; they involve nice issues of judgment and choice, * * * which require the exercise of informed discretion." (356 U.S. at 317, 78 S.Ct. at 757, citations omitted) Similarly, a decision of whether or not it would be in keeping with sound policy to sell a particular parcel of land at a certain offered price involves the exercise of informed discretion.

See also LaRue v. Udall, 324 F.2d 428 (C.A. D.C. 1963), cert. den., 376 U.S. 907; United States v. Mackintosh, 85 Fed. 333, 336 (C.A. 8, 1898).

C. The Department of the Interior's interpretation and consistent application of a statute are entitled to great deference. - The Department of the Interior has long taken the consistent position that an application to enter public lands confers no absolute rights, where the allowance of such claim

is discretionary with the Secretary of the Interior, or classification of the land is a prerequisite to the allowance of an entry. Joseph E. Hatch, 55 I.D. 580 (1936); Lewis Lafon Gourley, A-28497 (November 6, 1961); Raymond L. Gunderson, 71 I.D. 477 (1964).

The weight that is given by courts to an interpretation of a statute by the Secretary of the Interior in the area of its expertise was stated repeatedly by the Supreme Court in Udall v. Tallman, 380 U.S. 1 (1965). That Court held at page 16:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.

In the Tallman case, the Supreme Court reversed a decision of a court of appeals which was premised on that court's different interpretation of an Executive Order than had been given to it by the Secretary of the Interior.

There can be no question but that the classification of public lands has been given to the Secretary of the Interior as a discretionary matter. Obviously it was never intended

by Congress that a hearing be held on a discretionary matter. "Where Congress intended a hearing to be held, it provided therefor in express terms, as it did in § 1 of the Taylor Grazing Act * * *." LaRue v. Udall, 324 F.2d 428, 432 (C.A.D.C. 1963).

The years of administrative practice within the Department of the Interior, all with congressional knowledge and approval, are entitled to great weight when the meaning of a statute is being considered by a court. From the fact that Congress has been aware of the broad classification powers being exercised by the Secretary and that it has not chosen to limit them in any way, we can infer that Congress deems the Secretary to be carrying out its intent. Brooks v. Dewar, 313 U.S. 354, 360-361 (1941); cf. United States v. Jackson, 280 U.S. 183, 196-197 (1930).

This case is in many ways analogous to Udall v. Tallman, 380 U.S. 1 (1965). In that case, the Secretary of the Interior was recognized as having complete discretion in determining whether lands were to be leased for oil and gas

development. In this case, the Secretary has the same absolute discretion as to how he will classify lands. In addition to stating that administrative interpretation of statutes must be given considerable weight, the court recognized that no hearing is required in determining whether lands would be made available for leasing.

D. The district court has erroneously assumed that the filing of an application to enter public lands has given the applicant a property right. - No rights to the land applied for are obtained by the filing of an application to enter. Only after the entry is allowed do any rights accrue. A preference right to enter the land is given an entryman if and when the land is favorably classified by the Secretary or his designated representative. No preference rights have accrued to the applicants in this case, since the land never was favorably classified. In this case, the lands applied for were found by the Secretary not to be suitable for desert land entry after a thorough and exhaustive analysis of the physical situations involved.

Since the applicants to enter public lands have no property right by virtue of having filed applications, there is absolutely nothing on which to base a due process of law argument. The district court posed the question to be determined as being "whether or not the plaintiffs were deprived of due process of law * * *" (R. 152). We submit that the applicants to enter public lands have not been deprived of a property right which would raise the due process question posed by the district court. A similar situation to this was presented in LaRue v. Udall, 324 F.2d 428, 432 (C.A.D.C. 1963), where a Fifth Amendment argument was advanced. There the court found that, since one of the provisions of the Taylor Grazing Act being dealt with provided that no rights were to be created by virtue of the operation of that section, no hearing was required in taking away grazing privileges. The result should be no different here. Only if the Secretary in the exercise of his discretion favorably classifies land, do rights accrue.

II

IN ANY EVENT, IT DOES NOT APPEAR
THAT THE LACK OF ADVERSARY HEARING
IN THE FIRST INSTANCE PREJUDICED APPELLEES

An examination of the administrative record shows that the appellees' written arguments and evidence have been thoroughly and carefully reviewed by the Department of the Interior at several levels. There is nothing arbitrary or capricious in the manner that the appellees' evidence, which they were permitted to submit, was treated by the Secretary. It would be difficult to find anywhere a more thorough consideration of the facts in this case than is contained in the Secretary's second decision rendered in this matter (R. 173-184). Appellees have no specific complaint as to facts not shown or as to arguments they were unable to make.

The classification question presented by the appellees' applications to enter was a question of fact, the decision of which by the Secretary of the Interior, or his authorized representative, is conclusive in the absence of fraud or imposition. Cameron v. United States, 252 U.S. 450, 459-461 (1920); Boesche v. Udall, 373 U.S. 472, 476-477 (1963); Best v. Humboldt Mining Co., 371 U.S. 334, 335-336 (1963).

The appellees were able to present all their evidence and views to the Secretary and his subordinate officials. Cf. The Dredge Corporation v. Penny (C.A. 9, No. 19964, May 23, 1966) ; Southwestern Petroleum Corp. v. Udall (C.A.10, No. 8250).[3/] Nothing would have been gained by permitting the appellees to present this material orally or to cross-examine the Land Office technician who conducted experiments to ascertain the suitability of the land for agricultural uses. The only result would be delays and extended litigation. It was by design that Congress made this question of fact one to be determined by the exercise of discretion, rather than a matter to be resolved through litigation.

The question of whether or not a hearing was required involving another section of the Taylor Grazing Act was discussed at length in LaRue v. Udall, 324 F.2d 428 (C.A. D.C. 1963). There the court concluded at page 432 that: "Where Congress intended a hearing to be held, it provided therefor in express terms, as it did in § 1 of the Taylor Grazing Act

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3/ Mimeographed copies of this unreported opinion are filed herewith.

(315 U.S.C. § 315)." The result in the present case should be no different than the result reached by the Court of Appeals for the District of Columbia Circuit.

The procedure followed here is not unique. The courts have held that offers to lease, i.e., applications, confer no rights to a lease but give only a priority to a lease if the Secretary, in his discretion, determines that a lease should issue. Haley v. Seaton, 281 F.2d 620 (C.A.D.C. 1960). Were a hearing required prior to every discretionary action being taken by the land office, delays would naturally follow which never were intended by Congress. It is the recognition of the possible delays and expense of hearings and appeals that Congress can and did see fit to dispose of the public lands through the statutes it enacted which give the Secretary of the Interior the discretion to act as he did in this case. The district court's judgment would convert general managerial decisions made in the course of administration of public lands (cf. Boesche v. Udall, 373 U.S. 472 (1963)) into individually litigated matters in every case. Such a serious impediment on management of the public lands is, we submit, plainly unwarranted.

III

THE EARLIER JUDGMENT WAS RES ADJUDICATA

The appellees herein in both complaints filed in this controversy stated that "This action involves title to and right to possession of two parcels of certain public lands situate in the County of Kern, State of California." The first complaint stated that the action was brought under the Administrative Procedure Act. The second action was stated to arise under the Fifth Amendment of the United States Constitution. Both sought to restrain the appellant from taking any further action affecting the lands sought by the appellees and the reinstatement of their desert land applications. The first complaint also asked the court to adjudge the complained-of rejection to be arbitrary, capricious, discriminatory, unlawful and in excess of the statutory powers of the appellant. The relief asked for in both actions was identical, i.e., reversal of the Departmental decision. The only new element of the second complaint was as a somewhat different legal argument to justify the same result requested.

This Court in Hatchitt v. United States, 158 F.2d 754, 755 (1946), stated the rule as follows:

> It is well settled that a valid and final judgment may be successfully pleaded in bar against any subsequent action between the same parties dealing with the same right as to the same res. That the muniment of right in each case is different does not militate against the application of the rule, so long as the general type of right in the identical res is the same.

This Court proceeded to develop the foundation for this rule by quoting from several Supreme Court cases as follows (pp. 755-756):

> In the leading case of Northern Pacific R. v. Slaght, 205 U.S. 122, 130-132, 133, 27 S.Ct. 442, 445, 51 L.Ed. 738, the court said:
>
> > "The question as to such judgment when pleaded in bar of another action will be necessarily its legal identity with such action. The general rule of the extent of the bar is not only what was pleaded or litigated, but what could have been pleaded or litigated. There is a difference between the effect of a judgment as a bar against the prosecution of a second action for the same claim or demand, and its effect as an estoppel in another action between the same parties upon another claim or

demand [cases cited], and a distinction between personal actions and real actions is useful to observe. Herman, Estoppel, § 92. It is there said: 'Although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided; for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated.'

"In United States v. California & Oregon Land Co., 192 U.S. 355, 24 S.Ct. 266, 48 L.Ed. 476, this principle was applied. In that case a decree rendered upon a bill in equity brought under an act of Congress to have patents for land declared void, as forfeited, and to establish the title of the United States to the land, was held to be a bar to a subsequent bill brought against the same defendants to recover the same

land, on the ground that it was excepted from the original grant as an Indian reservation. And, speaking of the two suits, we said, by Mr. Justice Holmes: 'The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee.' And further: 'But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim [cases cited]; and, a fortiori, he cannot divide the grounds of recovery.'

* * * * *

"In other words, plaintiff in error, as successor of the Spokane & Palouse Railway Company, <u>again asserts title to the very property that was the subject of the other suit, the source of title, only, being different. If this may be done, how often may it be repeated? If defeated upon the new title, may plaintiff in error assert still another one, either in its predecessor or in itself, and repeat as often as it may vary its claim</u>?

> The principle of res judicata and the cases enforcing and illustrating that principle declare otherwise." [Emphasis supplied.]

The general doctrine is stated in Stark v. Starr, 94 U.S. 477, 485 (1876):

> It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.

In Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, 469-470 (C.A. 3, 1950), that court held:

> The purpose of the principle of res judicata is to end litigation. The theory is that parties should not have to litigate issues which they have already litigated or had a reasonable opportunity to litigate. A reading of the early cases as compared with recent ones makes it clear that the meaning of "cause of action" for res judicata purposes is much broader today than it was earlier. Formerly the whole aim in pleading, and in the elaborate system of writs, was to frame one single legal issue. That being the

> guiding principle, the phrase "cause of action" came to have a very narrow meaning. If the theory in the second suit was unavailable under the writ used in the first suit, the plaintiff had no opportunity to litigate it there and so plaintiff was not barred by res judicata. The force of the rule is still operative but the scope of its operation has been greatly limited by the modernization of our procedure. The principle which pervades the modern systems of pleading, especially the federal system, as exemplified by the free permissive joinder of claims, liberal amendment provisions, and compulsory counterclaims, is that the whole controversy between the parties may and often must be brought before the same court in the same action. The instant case presents an excellent example of one of the things these rules were designed to avoid. As pointed out above, the acts complained of and the demand for recovery are the same. The only thing that is different is the theory of recovery.

So here, the only new element introduced by appellees' second complaint was a legal argument based on alleged violation of due process. There is no exception from the rules of res adjudicata of alleged constitutional grounds. Thus, a decision as to just compensation under the Fifth Amendment is res adjudicata. Annat v. United States, 277 F.2d 554 (C.A. 5, 1960).

This Court in Myers v. Gardner (unreported, No. 20282, May 9, 1966) recently affirmed with approval the language of the district court where it had stated: "A judgment can only be collaterally attacked if it is obtained by extrinsic fraud or, probably, if there was a failure of due process. United States v. Throckmorton, 98 U.S. (8 Otto) 61 (1878)." The Supreme Court in United States v. Throckmorton, while not treating with due process, did consider an analogous situation. The Court at p. 68 stated:

> * * * that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

Thus, the possible due process exception relates to defects in the court proceedings leading to the first judgment, not simply afterthought, as to the merits fairly adjudicated in the first case. We submit that appellees were entitled to attack the decision of the Department of the Interior only once, not twice, three times or interminably. They were obliged to present at the first judicial proceeding all of their objections to the administrative action.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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JUNE, 1966

CERTIFICATE OF EXAMINATION OF RULES

I certify that I have examined the provisions of Rules 18 and 19, C.A. 9, and that in my opinion the tendered brief conforms to all requirements.

GEORGE R. HYDE
Attorney, Department of Justice
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APPENDIX

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

LEONARD S. NOREN, HARRY C. PERRY, Plaintiffs, vs. WALTER E. BECK, as Manager of the United States Land Office at Sacramento, California, RAYMOND R. BEST, as Regional Administrator, Bureau of Land Management, Department of the Interior, Defendants.	No. ND 2139 CIVIL COMPLAINT

Plaintiffs complain of defendants and respectfully represent to this Honorable Court:

I

This action is brought under the Administrative Procedure Act (60 Stat. 243, enacted June 11, 1946) and specifically under Section 10 of said Act (5 USCA 1009). Jurisdiction is vested in this court by said statutes and by

28 USCA, Section 1392; the matter in controversy, as to each of the parcels of land hereinafter referred to, exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

II

Plaintiffs are residents of the County of Ventura, State of California, and are now and at all times herein mentioned have been citizens of the United States over the age of 21 years and are joined in this action because of the similarity of their cases.

III

Defendant WALTER E. BECK is the duly appointed, qualified and acting Manager of the United States Land Office, Department of the Interior, at Sacramento, California; defendant RAYMOND R. BEST is the duly appointed, qualified and acting Regional Administrator, Bureau of Land Management, Department of the Interior, stationed at Sacramento, California, and has some official duty and responsibility in the matters hereinafter referred to, the nature and extent of which are unknown to plaintiffs.

IV

This action involves title to and right to possession of two parcels of certain public lands situate in the County of Kern, State of California.

V

On November 26, 1951, plaintiff LEONARD E. NOREN filed in the United States Land Office at Sacramento, California his desert land application covering the S-½ of Section 22, Township 32 South, Range 26 East, Mount Diablo Base and Meridian in the County of Kern, State of California; that at the time of said filing said S-½ of said Section 22 was open public land and land, not timber or known mineral, which would not then and will not now, without irrigation, produce some agricultural crop; that said Land Office approved said application as to form and content and accepted the same together with the fee thereon required by law.

On January 3, 1952, plaintiff, HARRY C. PERRY, filed in the United States Land Office at Sacramento, California, his desert land application covering the SE-¼ of Section 20, in the said Township and Range and in the County of Kern, State

of California; that at the time of filing said application, said SE-¼ of said Section 20 was open public land and land, not timber or known mineral, which would not then and will not now, without irrigation, produce some agricultural crop; that said Land Office approved said application as to form and content, accepted the same together with the fee thereon required by law.

VI

That the manager of said Land Office, under the applicable rules and regulations of the Department of the Interior, is now and at all times herein mentioned was, authorized and empowered to allow or reject Desert Land Applications in accordance with the statutes in such case made and provided.

VII

That on January 9, 1953, the manager of said Land Office rejected plaintiffs' applications on the ground that the soil of both of the parcels of land applied for was unsuitable for agricultural development; that prior thereto, to wit: on June 15, 1951, said manager allowed the desert land application of one PETER A. LUPPEN covering land in the same township and range and adjacent to the lands covered by plaintiffs'

applications and in the same soil classification as the land included in plaintiffs' applications; that thereafter, to wit: on May 21, 1953 and within six months after his rejection of plaintiffs' applications the manager of said Land Office allowed the desert land application of one LYTTON F. IVANHOE, JR., covering land in the same township and range and in the same soil classification as the land covered in plaintiffs' applications; that neither of plaintiffs has ever been granted any hearing on his said application or on the rejection of the same.

VIII

That the action of said manager in rejecting plaintiffs' applications was as to each of them arbitrary, capricious, discriminatory, unlawful, illegal and a denial of rights accorded plaintiffs, and each of them, by the statute and constitution of the United States and particularly Section 7 48 Stat. 572 and 19 Stat. 327, in that the soil in the case of all four applications heretofore mentioned was and is of substantially the same type and character and in truth and in fact the land in each of the four applications for desert land entry heretofore mentioned was and is land,

not timber or known mineral, which by appropriate reclamation methods and with irrigation can be made to produce abundant agricultural crops of various kinds as shown by actual agricultural operations on land of substantially the same type and character in the immediate vicinity and in the same soil classification and by recognized agricultural tests.

IX

That plaintiffs upon said rejection of their said applications by said manager of said Land Office, appealed said rejection to the Director of the Bureau of Land Management, Department of the Interior, who affirmed the decision of the Director of the Bureau of Land Management and on October 15, 1960, denied plaintiffs' application for reconsideration of his said decision; that no further action is possible by plaintiffs in said Department of the Interior.

WHEREFORE, plaintiffs demand that it be adjudged and decreed:

1. That a temporary restraining order and preliminary injunction issue out of this court directing defendants and each of them and their subordinates and agents to refrain from any action affecting the status of the lands described herein pending further order of this court.

2. That it be adjudged and decreed that the rejection of plaintiffs' applications, and each of them, was arbitrary, capricious, discriminatory, unlawful and in excess of the statutory powers of defendants and that the same be set aside.

3. That defendants be required to reinstate the desert land applications of plaintiffs, and each of them, in the Sacramento Land Office, allow the same and authorize plaintiffs, and each of them, to enter the lands covered in their said applications as desert land entrymen all in the manner provided by law.

4. That plaintiffs have such other and further relief as to the Court may seem proper.

Dated at Fresno, California, this 14 day of December, 1960

CLAUDE L. ROWE and EDSON ABEL

By Claude L. Rowe
Attorneys for plaintiffs

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NORTHERN DIVISION

LEONARD S. NOREN, HARRY C. PERRY, Plaintiffs, -vs- WALTER E. BECK, as Manager of the United States Land Office at Sacramento, California, et al., Defendants.	No. 2139-ND MEMORANDUM AND ORDER Filed March 8, 1963

This is an action to review the decision of the Bureau of Land Management, Department of Interior, denying plaintiffs' applications for entry upon certain lands in Kern County pursuant to the Desert Land Act (43 U.S.C. Sec. 321, et seq.)

From a decision of the Director of the Bureau of Land Management affirming the January 9, 1953 decision of the Manager of the Sacramento Land Office, which rejected plaintiffs applications, plaintiffs appealed to the Secretary of the Interior. There the cases were remanded to the Bureau of Land

Management with instructions to allow plaintiffs a reasonable time in which to submit evidence to disprove classification of the lands as unsuitable for agricultural development and to reconsider the classification in the light of that and other pertinent evidence.

An important consideration in the Secretary's decision to remand the cases was the showing made that two applicants in the vicinity of the land desired by plaintiffs were apparently meeting with success in reclaiming their lands.

Further investigation showed that in one case a patent was granted only because of a technicality, and the actual fact was that there had been no success in reclaiming the land. In the other case, a relinquishment of the desert land entry was filed on September 9, 1959, after attempts to reclaim the land proved unsuccessful.

The results met in these two cases lend support to the determination made by the Department that the lands in question are not suitable for agricultural purposes. This determination was reached on the basis of examination of the

land by a field examiner, soil samples taken from the land and analyzed by chemists, and information contained in "Soils Survey Bakersfield Area, California," U.S.D.A. Bulletin No. 12.

Evidence from these sources show that the soils involved herein are of an excessive saline nature, unsuitable for agricultural purposes; that there is a lack of proper drainage; that the expense of adding gypsum to the land and providing proper drainage, which might make the lands usable for growing some crops, would be prohibitive in relation to the value of the lands.

Plaintiffs presented two affidavits by Orval Fillmore, a man with 35 years of experience in the planting, growing and culture of alfalfa, in which he describes two experiments wherein soils from the lands in question were removed to Ventura County and alfalfa planted in beds of the soil. He met with some apparent success.

These experiments were discounted by the Director of the Bureau of Land Management, however, because they showed nothing regarding drainage, a problem of importance in the determination of the land's unsuitability for agricultural

purposes. The Director again affirmed the decision of the Manager of the Land Office, and on appeal this decision was affirmed by the Secretary of the Interior on September 13, 1960.

Administrative remedies having been exhausted, the present action was commenced and the case was submitted upon the administrative record. This Court has previously held that the only evidence it may consider herein is the record made during the administrative proceedings in the Department of Interior, and the only question to be resolved is whether the decision of the Department of the Interior is supported by the evidence. See this Court's Opinion in the present case (Noren and Perry v. Beck, et al., 2139-ND), dated November 21, 1961, and the authorities cited therein.

Where the decision is supported by the record, it is conclusive, in the absence of fraud or imposition; and this Court cannot substitute its judgment for that of the Department. Ickes v. Underwood, 141 F.2d 546.

There has been no showing of fraud or imposition, and after a careful review I find that the administrative decision and the findings upon which it is based are abundantly supported by the evidence appearing in the record.

IT IS THEREFORE ORDERED that the decision of the Secretary of the Interior, dated September 13, 1960, is hereby affirmed.

IT IS FURTHER ORDERED that the Amended Complaint against defendants herein be, and the same is hereby, dismissed

Dated: March 8, 1963.

M. D. CROCKER
United States District Judge